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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
DISTRICT OF UTAH

CENTRAL DIVISION

BY: _____
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UNITED STATES OF AMERICA,

Plaintiff,

vs.

**THOMAS E. MOWER, LESLIE D.
MOWER, JAMES THOMPSON,**

Defendants.

**MEMORANDUM DECISION AND
ORDER**

Case No. 2:02CR787DAK

This matter is before the court on Defendant Thomas E. Mower's Motion to Dismiss the First Superseding Indictment for Violation of the Due Process Clause, Defendant Leslie D. Mower's Joinder in that motion, Thomas E. Mower's Objection to Magistrate Judge Alba's Order, and Leslie D. Mower's joinder in that objection. A hearing on the motion and objection was held on October 5, 2004. At the hearing, the United States was represented by Caryn D. Mark, Defendant Thomas Mower was represented by Max D. Wheeler, and Defendant Leslie D. Mower was represented by Neil A. Kaplan. The court took the motion under advisement. The court has considered carefully the memoranda and other materials submitted by the parties, as well as the law and facts relating to the motion. Now being fully advised, the court issues the following Memorandum Decision and Order.

Objection to Magistrate's Order

The parties agreed at the hearing that the Objection to Magistrate Judge Alba's Order is

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moot because the government has identified an expert witness and provided Defendants with summaries of her reports and a summary of her testimony. Therefore, no ruling is necessary on the merits of the objection.

Motion to Dismiss First Superseding Indictment

Thomas Mower's Motion to Dismiss alleges a violation of due process because an in-house attorney for Neways, Allen Davis, who Mower claims was also his personal attorney, was compelled to testify before the grand jury based on an order finding that the crime-fraud exception vitiated the attorney-client privilege. Mrs. Mower joins in all of the legal and factual arguments made by Thomas Mower.

Davis entered into an immunity agreement with the government on March 12, 2002, granting him immunity with respect to testimony concerning the creation and production of a fraudulent loan document provided to IRS Special Agent Ted Elder in connection with the investigation of the Mowers and Neways. The immunity agreement recognized Davis' right to invoke a reasonable claim of privilege.

Davis initially appeared before the grand jury on March 13, 2002, and asserted the attorney-client privilege in response to several questions. The government filed a motion to compel his testimony based on the crime-fraud exception to the attorney-client privilege. The government had an ex-parte hearing before Judge Benson on November 6, 2002, and obtained an order compelling the grand jury testimony of Allen Davis despite the fact that the information would have otherwise been protected by the attorney-client privilege. Judge Benson concluded that the crime-fraud exception applied because the documents and communications were in furtherance of a crime or fraud.

Judge Benson's Order allowed the government to ask questions regarding Thomas and Leslie Mower's failure to report on their U.S. individual income tax return or a U.S. corporate income tax return their commission income earned from Neways U.S., Neways Australia, Neways Malaysia, and other Neways entities from 1989 through the present, the preparation and presentation of phoney loan documents to the IRS, the preparation and filing of Mower's individual income tax returns, the preparation and filing of Neways corporate tax returns, the preparation and filing of Mower Properties tax returns, the preparation and filing of amendments to Neways corporate tax returns, the falsification of Neways U.S. and Mower Properties' corporate books and records and other attempts to further the Mowers' tax fraud scheme.

After obtaining the order signed by Judge Benson, the government re-examined Davis before the grand jury on December 5, 2002, and questioned him at length concerning matters he had previously declined to answer based on privilege.

Thomas Mower previously sought to unseal the hearing transcript and any evidence provided to Judge Benson in support of that motion to compel so that his attorneys could determine whether the government's pre-indictment conduct violated his due process rights. However, this court denied the motion because Mower did not meet the standard for intruding on grand jury materials.

In the present motion to dismiss, Mower argues that Davis' testimony before the grand jury violated his due process rights and constituted prosecutorial misconduct occurring prior to the indictment. The government responds that there was no deliberate intrusion into the attorney-client relationship because the criminal communications at issue were not protected under the crime-fraud exception.

A pre-indictment invasion of a defendant's attorney-client relationship can form the basis of a due process violation. *United States v. Kennedy*, 225 F.3d 1187, 1194 (10th Cir. 2000).

However, the misconduct must shock the conscience of the court. *Id.* The outrageousness of the government's conduct is an issue of law for the court. *United States v. Pardue*, 983 F.2d 843, 847 (8th Cir. 1993). In *Kennedy*, the Tenth Circuit stated that

in order to successfully raise a colorable claim of outrageousness pertaining to alleged governmental intrusion into the attorney-client relationship, the defendant's submissions must demonstrate an issue of fact as to each of the three following elements: (1) the government's objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant; (2) deliberative intrusion into that relationship; and (3) actual and substantial prejudice.

225 F.3d at 1195.

The main issue that Mower's motion raises—whether the government's intrusion into his attorney-client relationship with Davis was warranted under the crime-fraud exception to the attorney-client privilege—falls within the second prong of the *Kennedy* test. Mower argues that Davis' first grand jury testimony did not support a finding that the testimony would fall under the crime-fraud exception to the attorney-client privilege. The government contends that the crime-fraud exception applies to Davis' testimony because it involved communications between the Mowers and Davis that were in contemplation and furtherance of illegal activity.

Although the attorney-client privilege is regarded as sacred and serves to promote full and frank discussions between client and attorney, it must yield when clients attempt to benefit by abusing the relationship. *Clark v. United States*, 289 U.S. 1, 15 (1933). The attorney-client privilege does not attach to communications if the attorney's assistance was used to cover up, further, or perpetuate a crime or fraud. *Id.* "Communications made in connection with legal

assistance related to ongoing or intended criminal or fraudulent conduct are not privileged regardless of their content.” *In re Grand Jury Investigation Schroeder*, 842 F.2d 1223, 1228 (11th Cir. 1987). The crime-fraud exception applies to both the attorney-client privilege and the work-product doctrine. *In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461, 1467 (10th Cir. 1983). Furthermore, the exception applies even if the client uses the lawyer without the lawyer’s knowledge to misrepresent or conceal what the client has already done. *In re Grand Jury Proceedings*, 102 F.3d 748, 749-51 (4th Cir. 1996).

In a grand jury investigation, the government must show a prima facie foundation for the application of the crime fraud exception to the attorney-client relationship. *In re September 1975 Grand Jury Term*, 532 F.2d 734, 737 (10th Cir. 1976). A determination of whether that standard has been met lies in the discretion of the court. *Id.* The government must show prima facie evidence that the purportedly privileged communications were used in furtherance of a crime or fraud and that the alleged crime or fraud has some foundation in fact. *Clark*, 289 U.S. at 15, *In re Vargas*, 723 F.2d at 1467. There must be some relationship between the communications and the illegality. *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002). The exception applies when there is “reasonable cause to believe that the attorney’s services were utilized in furtherance of the ongoing unlawful scheme.” *Id.* Reasonable cause is more than suspicion but less than a preponderance of evidence. The prima facie foundation may be made by documentary evidence or good faith statements by the prosecutor as to testimony already received by the grand jury. *Varga*, 723 P.2d at 1467.

The government argues that there was substantial evidence to support the application of the crime-fraud exception in this case. This court previously found that Judge Benson correctly

concluded that the crime-fraud exception applied based solely on the testimony elicited from Davis during his first grand jury appearance. Mower has not provided evidence in support of this motion that changes the court's mind. Many of the Mowers' arguments go to the weight of the evidence against them, not the existence of a prima facie case. For example, Mower makes much of the fact that Mower was not present when James Thompson and Davis created a fraudulent loan document to present to the IRS. However, Mower does not mention that Thompson and Davis left a meeting with Mower and IRS Agent Elder to create the documents after Mower stated that he purchased the Hobble Creek property by borrowing money from Neways Australia and Agent Elder asked for documentation. The government was under no obligation to prove its case before seeking to compel Davis' testimony, only a prima facie case was required. In addition, Mower's reliance on the distinction between communications with respect to past conduct and communications in furtherance of a crime and the fact that Davis did not begin his employment with Neways until November 1996 is unavailing. Communications between the Mowers and Davis concerning matters predating November 1996 fall within the crime-fraud exception when such communications relate to the perpetuation of the fraudulent scheme and efforts to conceal ongoing fraud. The evidence established that the defendants used Davis to carry out, further, and conceal their tax fraud scheme. Likewise, even though Mrs. Mower argues that she was not involved in certain meetings in which fraudulent acts allegedly occurred, there was testimony that Davis was in communication with her as to what was transpiring. Acts of concealment and misrepresentation done in furtherance of the main criminal objectives of the conspiracy are affirmative acts of evasion and overt acts in furtherance of the conspiracy. *Grunewald v. United States*, 353 U.S. 391, 405 (1957). The government has

sustained its burden in presenting substantial and competent non-privileged evidence of the tax crime committed by Defendants. Therefore, the court concludes that the testimony established a prima facie case that the communications between Davis and the Mowers were in furtherance of a crime and that the alleged crime had some foundation in fact.

In addition, the court does not find that the actions of the government were so outrageous to shock the conscience of the court. The government granted immunity to Davis, a potential co-conspirator, in order to gain information. Information obtained in the government's investigation and the testimony elicited from Davis during his first grand jury appearance indicated that the crime-fraud exception applied. Rather than pressure Davis with respect to his assertion of attorney-client privilege during his first grand jury appearance, the government properly brought a motion to compel Davis' testimony. The government presented evidence to establish a prima facie case that the crime-fraud exception vitiated Davis' invocation of the attorney-client privilege, and the court ordered that the testimony could be compelled. Judge Benson's Order provided a specific time frame that corresponded with the facts of this case as well as topics tailored to the alleged fraudulent scheme. *None of this conduct meets the required level of outrageousness or shocks the conscience of the court.*

Mower attacks the scope of the government's questioning of Davis. Mower argues that the questioning was too broad and he takes issue with questioning related to the purchase of the Hobble Creek property, the intended use of the Hobble Creek property, amendments of personal and corporate tax returns, the construction of a warehouse, the existence of overseas income and local bank accounts, the organization of distributorships, and previous litigation involving Neways. The court agrees with Mower that the crime-fraud exception should be applied in

narrow situations. However, the questioning was within the scope of Judge Benson's Order and there is evidence to support that these topics are related to and intertwined with the tax fraud scheme alleged by the government. The breadth and ongoing nature of the fraud alleged in this case necessarily broadened the scope of the questioning. As stated above, the government need not prove its case as to each of these matters. Moreover, the court cannot selectively read Davis' testimony in a light most favorable to Mower. After conducting a review of the evidence provided by the parties, the court concludes that there was an adequate basis for the scope of questioning and that the government stayed within the scope of Judge Benson's order during its grand jury questioning of Davis.

Mower claims that this case is similar to the Oliver North case where the court found that the grand jury proceedings had been tainted by the use of privileged, but lawfully-compelled, testimony that North had given before Congress. *United States v. North*, 910 F.2d 843, 869 (D.C. Cir. 1990); *United States v. North*, 920 F.2d 940, 948-49 (D.C. Cir. 1990). Mower claims that in this case the prohibited act before the grand jury was the violation of his attorney-client privilege. However, Mower's reliance on the *North* case is misplaced because *North* dealt with privileged and immunized testimony that North, himself, had given before Congress. *North* would only apply in this case if the government used Davis' immunized or privileged testimony in a proceeding against Davis. The "[c]ompulsion of an attorney's testimony as to voluntary statements made by the client does not implicate the Fifth Amendment's protection of the client against compulsory self-incrimination. The statements might be protected by the attorney-client privilege, but not where . . . the crime-fraud exception applies." *In re Grand Jury Subpoenas*, 144 F.3d 653, 663 (10th Cir. 1998). This court refuses to extend *North* to limit the use of Davis'

testimony in a prosecution against others or to limit the applicability of the crime-fraud exception.

Mower also claims that this case is similar to *United States v. Schell*, 775 F.2d 559, 562-63 (4th Cir. 1985), where a defense attorney began working for the United States Attorney's office and made a grand jury appearance in the case in which he had previously represented a defendant. The court found that it was fundamentally unfair and prejudicial for the defense attorney to switch sides. *Id.* at 566.

In this case, Mower argues that when the government compelled Davis to testify against the Mowers, Davis, in essence, was forced to switch sides. The court, however, agrees with the government that *Schell* is not applicable because this case involves a potential co-conspirator testifying against other members of the conspiracy, not a compelled change in Davis' representation. The Mowers gave up the protection of the attorney-client privilege when they knowingly and willfully abused the attorney-client relationship with Davis to facilitate and conceal tax fraud. Moreover, "[g]overnment intrusions into pre-indictment attorney-client relationships do not implicate the Sixth Amendment." *United States v. Kennedy*, 225 F.3d 1187 (10th Cir. 2000). A defendant does not have a right to counsel until the government role has shifted from "that of factfinder to that of adversary." *Moran v. Burbine*, 475 U.S. 412 (1986). Therefore, because the questioning of Davis took place before the grand jury and before Mower was indicted he had no protection from the Sixth Amendment, even if he had chosen to retain Davis prior to the indictment.

The court finds that the communications between Thomas E. Mower, Leslie D. Mower, and Allen Davis were in contemplation and furtherance of illegal activity. Therefore, there was

no intrusion into a privileged relationship because the crime-fraud exception vitiated that privilege. Accordingly, there was no due process violation as a result of Davis' compelled testimony before the grand jury, and Mower's motion to dismiss is denied.

CONCLUSION

Based on the above reasoning, Defendant Thomas E. Mower's Motion to Dismiss the First Superseding Indictment for Violation of the Due Process Clause, joined in by Leslie D. Mower, is DENIED. Defendant Thomas E. Mower's Objection to Magistrate Judge Alba's Order, joined in by Leslie D. Mower, is MOOT.

DATED this ^{15th day of October,} ~~24th day of March,~~ 2004.

BY THE COURT:



DALE A. KIMBALL,
United States District Judge


no intrusion into a privileged relationship because the crime-fraud exception vitiated that privilege. Accordingly, there was no due process violation as a result of Davis' compelled testimony before the grand jury, and Mower's motion to dismiss is denied.

CONCLUSION

Based on the above reasoning, Defendant Thomas E. Mower's Motion to Dismiss the First Superseding Indictment for Violation of the Due Process Clause, joined in by Leslie D. Mower, is DENIED. Defendant Thomas E. Mower's Objection to Magistrate Judge Alba's Order, joined in by Leslie D. Mower, is MOOT.

DATED this 15th day of October, 2004.

BY THE COURT:



DALE A. KIMBALL,

United States District Judge

United States District Court
for the
District of Utah
October 18, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

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